

Lufthansa and the Coherent Application of State Aid Law: What is the Role of National Judges in Concurrent Proceedings?

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Abstract

In Lufthansa, the CJEU has added other important elements to the long-disputed question of how national judges are to enforce art. 108 (3) TFEU. This time, the sensitive issue was how domestic courts, hearing an application to stop the implementation of alleged State aid, should deal with the Commission's preliminary decision to initiate a formal investigation on the measure.

By focusing on the 'effective' outcomes of Lufthansa, this article sheds light on the coherent functioning of the ex ante control system for State aid, and, more generally, on the relationship between national judges and European Institutions. It argues that the judgment represents a coherent interpretation of the basic principles of the EU's constitutional order, and makes the role of national judges to enforce State aid rules even clearer and more relevant than before. This clarification is remarkably significant because it addresses certain gaps in the coherent enforcement of State aid law raised by the practical application of Lufthansa.

I Introduction

Coherence in law relates to the question of whether decisions in a specific domain fit both each other and the principles and logic of the norms they enforce.¹ It expresses the requirement that law shall pursue a given objective

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¹ S. Weatherhill, 'The Court's case law on the Internal Market: "A Circumlocutious Statement of the Result, rather than a Reason for Arriving at it"' in: M. Adams, H. De Waele, J. Meeusen & G. Straetmans (Ed.) *Judging Europe's Judges: The Legitimacy of the case law of the European Court of Justice* (Oxford 2013), 88.

‘in a [...] systematic manner.’² As such, the virtue of coherence is both an essential justification and a basic precondition for the proper functioning of any legal system,³ because it is closely associated with the more general preservation of legal certainty and with the realisation of fairness under the rule of law.⁴

Coherence, however, is not about achieving an unrealistic degree of perfection or rigidity.⁵ Rather, it is about recognising and managing necessary differences in any single case. In essence, then, what coherence demands – and, consequently, what we should expect from its application – is that decisions follow a comparable line of reasoning and that differences may be explained in a rational manner. The aim of ensuring coherence inevitably applies to the EU legal order. There are many reasons why it plays a preeminent role, two of which are particularly appropriate to the present analysis.

On the one hand, by virtue of its ultimate interpretative authority of EU law,⁶ the CJEU must shape the scope of the rules with a view to sustaining case law coherence. In this perspective, its judgments should fit each other and the set of principles already implicit in the coherent whole of the EU legal system.⁷ Otherwise, ‘any weakening, even if only potential, of the uniform application and interpretation of Community law [...] would be liable to give rise to distortions of competition and discrimination between economic operators.’⁸ On the other hand, each institution applying EU law should be able to enforce the principles and the rules in a uniform manner within the scope of its attributed competences. Coherence in the norms that apply is indeed only the first step. The rules themselves must also be enforced uniformly in concrete decisions. This is so because inconsistencies in adjudicating single cases may similarly jeopardise the attainment of a coherent set of remedies against illegalities.

To sum up, there is a strong argument that EU judges ought to strive to maintain the overall coherence of EU law in handing down judgments, and

² See the Opinion of Advocate General Poiares Maduro delivered on 30 September 2009 in Joined Cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez* [2009] ECLI:EU:C:2009:587, para. 21.

³ R. Dworkin, *Law's Empire* (Cambridge 1986), 225.

⁴ C. Bengoetxea, N. McCormick, & L.M. Soriano, ‘Integration and Integrity in the Legal Reasoning of the European of the European Court of Justice’, in: G. de Búrca & J.H.H. Weiler (Ed.), *The European Court of Justice* (Oxford 2001), 47.

⁵ N. Shuibhine, *The coherence of EU free movement law: Constitutional Responsibility and the Court of Justice* (Oxford 2013), 10.

⁶ K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ [2007/6] *CML Rev.*, 1625-1659.

⁷ S. Kingston, *Greening EU Competition Law and Policy* (Cambridge 2001), 135.

⁸ Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, point 11.

that any other institution also acts to ensure the coherent enforcement of the rules. The CJEU decision in *Lufthansa*⁹ provides an interesting benchmark to test this proposition. In this judgment, the Court is presented with the critical question of how national judges are to enforce the obligations laid down in the last sentence of art. 108(3) TFEU when the Commission decides to open a formal investigation on the same aid measure. As such, the case raises two fundamental questions about the coherent application of State aid law and, more generally, about the national courts' role in the Union legal order. Firstly, in its endeavour towards the remedial and procedural harmonisation of this area,¹⁰ the CJEU has to fit its previous case law on the interpretation of art. 108(3) TFEU, as well as the main principles of EU law. Secondly, both the Commission and the national judge must adopt decisions that fit each other, so as to implement the rules uniformly.

By connecting to the intense debate on the judgment in scholarship, this article provides a new perspective to assess the potential outcomes of *Lufthansa* on the power of national judges to guarantee the *ex ante* control for State aid. It does so by addressing the broader conceptual question concerning the role of domestic courts in case of concurrent proceedings in State aid field. This question is more pressing since the concrete application of the judgment may lead to certain gaps in the coherent whole of the system. This article argues that, despite the initial concerns that the CJEU went too far in subjecting domestic judges to the Commission's initial assessment, the role of national judges is still intact and important to guarantee coherence and uniformity in the application of State aid rules. This clarified role, in turn, may help to understand how the institutions should co-operate in order to get through the difficulties raised by the application of *Lufthansa* in domestic litigations. Therefore, this article will finally address the issue of whether the interpretation of the role of the domestic courts made in *Lufthansa* is liable to ensure in practice the consistent enforcement of State aid rules in case of concurrent proceedings (Section 4). But before approaching this issue, it will first consider how the principles pertaining to the separation of tasks between national judges and the Commission has been interpreted so far in the field of State aid (Section 2), and whether the judgment in *Lufthansa* made a correct application (Section 3).

⁹ Case C-284/12 *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* [2013] ECLI:EU:C:2013:755.

¹⁰ M. Dougan, *National remedies before the court of justice* (Oxford 2004), 338.

2 *Lufthansa* and its Predecessors: Towards a Coherent List of Remedies in Case of Simultaneous Proceedings on the Same Aid Measures

To fully appreciate the importance of the judgment, it is useful to make a brief summary of the procedural rules on State aid. They are laid down in art. 108 TFEU, in Regulation 659/99¹¹ and in the case law of the European Courts. These rules prescribe that any aid measure is to be notified to and approved by the Commission before it is implemented. For this purpose, art. 108(3) TFEU imposes on Member States both a notification duty and a standstill obligation when they plan to provide money for undertakings. While the latter obligation implies that Member States must inform the Commission in due time of any plan to grant or to alter measures falling within the definition of art. 107(1) TFEU, the former aims to guarantee that those measures cannot become operational before the Commission has reached a final decision on their compatibility. As a result, each duty serves the common purpose of facilitating the Commission's prior control on any State aid measure.¹²

Ever since the *obiter dictum* in *Costa v. Enel*¹³ and, finally, the express statement in *Lorenz*,¹⁴ the CJEU has made it clear that the last sentence of art. 108(3) TFEU produces direct effect. This means that, in the light of its sufficiently clear and unconditional provisions, the norm confers rights to individuals that can be enforced by domestic court.¹⁵ The consequence is that any national authority – including national judges – must cooperate with the EU institutions to secure the rights that individuals could derive from that provision. In practice, the roles of the institutions involved are complementary but separate.¹⁶ On the one hand, national judges are to preserve the rights of individuals confronted with a (potential) breach of the prohibition of art. 108(3) TFEU.¹⁷ For this purpose, they may have cause to interpret the notion of State aid laid down in art. 107(1) TFEU. On the other hand, the Commission retains the exclusive compe-

¹¹ Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union of the EC Treaty, *OJ L* 83/1, 1-9.

¹² See Case C-199/06 (*CELF I*) *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)* [2008] ECLI:EU:C:2007:434, para. 357.

¹³ Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECLI:EU:C:1964:66.

¹⁴ Case 120/73 *Gebrüder Lorenz GmbH v. Federal Republic of Germany and Land Rheinland-Pfalz* [1973] ECLI:EU:C:1973:152, para. 8.

¹⁵ D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the 'Functionalized Procedural Competence' of EU Member States* (Amsterdam 2010), 14.

¹⁶ Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others* [2006] ECLI:EU:C:2006:644, para. 37.

¹⁷ See the *Transalpine* judgment, para. 48.

tence to assess the compatibility of aid measures according to the procedure of Regulation 659/1999.¹⁸ Because of their overlapping scope and of the possibility of conflicting decisions on the same case,¹⁹ there must be coherence in the exercise of the mentioned competences. Indeed, the system provides a complete list of remedies against illegal State aids if any institution strives to achieve a common purpose.

Over the last two decades, the CJEU has been presented with the – sometimes potential – conflict between the Commission decisions and the judgments of national courts on the same aid measure. By interpreting the specific provisions of State aid law and the general principles of EU law, the CJEU has developed a rather complete set of rules to limit any difference, ambiguity and/or chance for inconsistent enforcement. In *FNCE*,²⁰ the question was whether the Commission's final decision declaring an un-notified aid compatible with the internal market had some effects on the validity of the act implementing the aid itself. As such, the case raised crucial questions concerning the powers of national courts to safeguard the effectiveness of the standstill obligation after the Commission has taken a definitive position.

In a rather succinct decision, the Court reiterated, first, the different roles of the two institutions. While the Commission retains the exclusive competence to decide on the compatibility of aid measures with the internal market, national judges are bound to preserve individuals' rights affected by the violation of the last sentence of art. 108(3) TFEU.²¹ The Court then pointed out that the power of national judges extends to all un-notified aids that are implemented, without any limitation period. In particular, national judges 'must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law'.²² Consequently, the Court concluded that the Commission's final decision does not have the effect of regularizing *ex post facto* the implementing acts of an unlawful measure.²³ This is so because any other interpretation would have the effect of

¹⁸ See Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECLI:EU:C:1999:332, para. 16; Case C-297/01 *Sicilcassa SpA contro IRA Costruzioni SpA and others* [2003] ECLI:EU:C:2003:416, para. 47.

¹⁹ See, in general, on the interlocking system of jurisdiction of the European Courts K. Lenaerts 2007, 1659.

²⁰ Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires (FNCE) and Syndicat National des Négociants et Transformateurs de Saumon v. French Republic* [1991] ECLI:EU:C:1991:440.

²¹ See *FNCE* judgment, para. 14.

²² *FNCE* judgment, para. 12.

²³ *FNCE* judgment, para. 17.

according a favourable outcome to defaulting Member States, and the effectiveness of the standstill obligation would be deprived.²⁴

A few years later, the Court had the chance to return on the issue of simultaneous proceedings. In *SFEI*,²⁵ the *Tribunal de Commerce* of Paris asked whether it was empowered to grant an order to repay the un-notified aid before the Commission had adopted a position on the compatibility question. Given the slightly similar question, it does not come as a surprise that the Court followed a comparable reasoning. In particular, because of the importance of the procedure for prior review of planned State aid and in view of the duty of the national judicature to protect the interested parties against the consequences of unlawful aids,²⁶ the Court ruled that national judges cannot defer their examination of an application for safeguard measures; Otherwise, Member States would be encouraged 'to disregard the prohibition' laid down in art. 108(3) TFEU.²⁷ Therefore, the repayment of an aid measure granted in breach of the standstill obligation was deemed to be, in principle, an adequate consequence (save for exceptional circumstances).²⁸

The cited approach, understood to mean that the national court shall act to block and to recover any unlawful aid in the case of simultaneous proceedings,²⁹ was redefined in *CELF I*.³⁰ The judgment originated from a preliminary request of the French *Conseil d'État*, which asked whether national courts shall order the recovery of an unlawful aid in case the Commission has adopted a positive decision. In essence, the case was apparently similar to *FNCE*. However, the CJEU followed a slightly different line of reasoning. In particular, while the division of tasks between the two institutions and its effects remained unaltered,³¹ the CJEU delimited the power of national judges more rigorously. For the European judges, since the last sentence of art. 108(3) TFEU 'is based on the preservative purpose of ensuring that an incompatible aid will never be implemented',³² the intention of the prohibition is that '*compatible aid may alone be implemented*'.³³ Therefore, the Court clarified that, to ensure the full realization

²⁴ *FNCE* judgment, para. 16.

²⁵ See Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v. La Poste and others* [1996] ECLI:EU:C:1996:285.

²⁶ *SFEI* judgment, paras 67 and 70.

²⁷ *SFEI* judgment, para. 69.

²⁸ *SFEI* judgment, para. 71.

²⁹ C. Vajda QC & P. Stuart, 'Effects of the Standstill Obligation in National Courts – all said after *CELF*? An English Perspective' [2010/3] *EStAL*, 629.

³⁰ *CELF I* judgment.

³¹ *CELF I* judgment, para. 38.

³² *CELF I* judgment, para. 47.

³³ *CELF I* judgment, para. 48.

of the effects of the provision, national judges must defer the implementation of planned aid until the doubt as to the compatibility is resolved by the Commission's final decision. Conversely, when the Commission adopts a positive decision, they are not required by EU law to order recovery of the aid.³⁴

The new approach was finally upheld in *CELFI II*.³⁵ Following the CFI annulment of the Commission's decision on the aid received by *CELFI*,³⁶ the *Conseil d'État* asked the Court whether it could stay the proceeding concerning the request to recover the aid until the Commission had decided on its compatibility with the internal market. Starting from the same understanding of art. 108(3) TFEU in *CELFI I*, the answer of the CJEU could not have been positive. In fact, since the intention of the provision is that compatible aid alone may be implemented and since the objective of the national courts' tasks is to remedy the unlawfulness of the implementation of the aid,³⁷ the European judges concluded that staying proceedings would render the provision, *de facto*, ineffective. For the Court, the principle of effectiveness requires national judges to adopt safeguard measures, to order the repayment of the aid with interest, or to require the placement of the funds on a blocked account, until the Commission has ruled on the compatibility of the measure.³⁸

To sum up, in the case law before *Lufthansa*, the CJEU has clarified that the obligation to realize the effects of the standstill obligation is fulfilled when national judges act to prevent the payment of the aid until the Commission has ruled on its compatibility. The obligation ceases if, 'by the time the national court renders its judgment, the Commission has already decided that the aid is compatible with the common market'.³⁹

³⁴ C. Vajda QC & P. Stuart 2010, 633.

³⁵ See Case C-1/09 (*CELFI II*) *Centre d'exportation du livre français (CELFI) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)* [2010] ECLI:EU:C:2010:136.

³⁶ See Case T-348/04 *Société internationale de diffusion et d'édition SA (SIDE) v. Commission of the European Communities* [2008] ECLI:EU:T:2008:109.

³⁷ *CELFI II* judgment, paras 29-30.

³⁸ *CELFI II* judgment, paras 35-37.

³⁹ See the '2009 Notice of the Commission', para. 34 (Commission notice on the enforcement of State aid law by national courts OJ C 85, 9.4.2009, 1-22).

3 The Complementary Role of National Courts in Case of Commission Preliminary Decisions: did the CJEU Misinterpret the Principles of EU Law in *Lufthansa*?

One of the few last questions that remained unsettled was whether and to what extent the preliminary – and, therefore, provisional – decision of the Commission is binding on national judges. Before *Lufthansa*, the speculative analysis of scholars⁴⁰ and the Commission tried to address it. The approach proposed in the literature followed the case law in competition law. By analogy with *Masterfoods*,⁴¹ it was said that national courts should stay the proceedings in order to avoid any risk of taking decisions that conflict with the EU institutions, unless they consider that a preliminary reference to the Court might solve the question.⁴²

The 2009 Notice of the Commission seemed to suggest a rather different approach.⁴³ According to the Commission, the mere decision to suspend national proceedings would leave individuals' rights unprotected. However, domestic judges could wait for the Commission's final compatibility assessment if they took appropriate interim measures, such as ordering the depositing of funds into a blocked account. Eventually, the CJEU had the occasion to rule on this question in *Lufthansa*.

3.1 Facts and Ruling

The case under examination followed a well-trodden path in the private enforcement of State aid law.⁴⁴ A private undertaking – *Lufthansa* – sought redress from a national court against the public operator of *Frankfurt-Hahn* Airport for the allegedly unlawful aid granted to a competitor – *Ryanair Ltd*. The suspect subsidy involved a reduction of airport fees and various marketing provisions set up to attract the latter airline company. Convinced that this commercial relationship should be qualified as State aid and infringed the

⁴⁰ P. Nebbia, 'State aid and the role of national courts' in: E. Szyszczak (Ed.), *Research Handbook on European State Aid Law* (Cheltenham 2011), 390.; G. Abbamonte, 'Competitors' rights to challenge illegally granted aid and the problem of conflicting decisions in the field of competition law' [1997] *ECLR*, 89 et seq.; K. Bacon, *European Union Law of State Aid* (Oxford 2013), 558.

⁴¹ Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd*. [2000] ECLI:EU:C:2000:689.

⁴² K. Bacon, 2013, *ibid.*, 558.

⁴³ See the '2009 Notice of the Commission', para. 62.

⁴⁴ According to a thorough analysis on State aid enforcement, this type of litigation accounts for almost 20% of the total State aid actions at national level. See T. Jestaedt, J. Derenne & T. Ottervanger (coordinators), *Study on the Enforcement of State Aid Law at National Level* (Luxembourg Office for Official Publications of the European Communities 2006), 41.

standstill obligation under art. 108(3) TFEU, *Lufthansa* sought, first, an order for the cessation of the aid provision and for the recovery of the sums already handed out. Then, as the action was dismissed, it appealed to the higher national court.

What is unusual in this ‘standard’ framework is an occurrence that happened pending the domestic judgment. The same alleged State aid measures came under the ‘spotlight’ of the Commission, which later initiated a formal investigation procedure under art. 108(2) TFEU. In particular, the Commission took the preliminary view that the financial supports were likely to satisfy all the conditions of art. 107(1) TFEU, and did not meet *prima facie* the private investor principle ‘on the basis of the information available to it at the time of the adoption of the decision.’⁴⁵ In addition, it had doubts about its compatibility with the internal market. Accordingly, it decided to initiate a formal investigation to dispel any doubts about the compatibility of the measures. To avoid any risk of taking inconsistent actions, the German court asked the CJEU whether it was bound by the Commission’s viewpoint expressed in the preliminary decision as to whether a measure constituted State aid.

The line of reasoning of the *Lufthansa* judgment is simple and succinct. On the one hand, the Court restated the overall functioning and objectives of the checking mechanism laid down in art. 108 TFEU. According to the CJEU, the system is based on an *a priori* control of State aid measures, whose aim is to allow compatible aids alone to be implemented. Therefore, the payment of measures whose compatibility is still uncertain must be deferred until that question has been fully addressed.⁴⁶ On the other hand, the Court recalled the distinct tasks and obligations of the institutions enforcing State aid rules (i.e., the Commission and national judges). First, their respective role is complementary but separate.⁴⁷ While the compatibility assessment falls within the exclusive competence of the Commission,⁴⁸ national courts shall act to safeguard the rights of individuals negatively affected by a possible violation of the prohibition to implement un-notified aids. Second, the CJEU recalled the noteworthy obligation of sincere cooperation and the duty to ensure the effectiveness of EU law. Member State courts are obliged not only to give EU law full force and to ensure its utmost effectiveness,⁴⁹ but also to refrain from taking decisions that jeopardise the attainment of the Treaties’ objectives.⁵⁰

⁴⁵ See the *Lufthansa* judgment, para. 16.

⁴⁶ *Lufthansa* judgment, paras 25-26.

⁴⁷ *Lufthansa* judgment, para. 26.

⁴⁸ *Lufthansa* judgment, para. 28.

⁴⁹ *Lufthansa* judgment, para. 38.

⁵⁰ *Lufthansa* judgment, para. 41.

When the Commission investigated the same case and took an official – though provisional – position, the CJEU concluded that the preliminary decision had legal effects, in the sense that national courts should consider the payment as an infringement of the notification obligation and should take appropriate measures.⁵¹ For this purpose, the Court made a full list of possible measures that national judges may take in order to fulfil their task.⁵² They may suspend the implementation of the measure and order the recovery of provisional measures. In addition, should they retain doubts about the State aid nature of the measure or about the interpretation of the decision, they may seek clarification from either the Commission or the Court.

3.2 Some *Prima Facie* Criticisms (...)

At first sight, it may appear that the CJEU has made a groundbreaking move for the sake of ensuring the coherent enforcement of State aid law. It is so particularly if one focuses merely on the consequences of the judgment. Because the domestic courts must refrain from taking decisions that conflict with the Commission's official viewpoint, their role seems to be relegated to mere executors of someone else's will.

Scholarship has generally received the judgment with similar negative comments. The most relevant criticism points at the 'unnecessary hardship'⁵³ of the supposed unconditionally binding effect of the Commission's opening decision on the proceedings brought before national courts. Elsewhere it was argued that, because of the line taken by the CJEU, the mere dubitative conclusion that a measure may constitute State aid is *de facto* elevated to the Commission's final decision.⁵⁴ What is more, it even becomes a constituent element of an injunction ordered by the national courts,⁵⁵ as the infringement of art. 108(3) TFEU is to assume. This 'scary outcome'⁵⁶ – it was said – represents a disproportionate application of the *effet utile* of the standstill clause and is to the detriment of the aid recipient.⁵⁷

⁵¹ *Lufthansa* judgment, para.42.

⁵² *Lufthansa* judgment, paras 43-44.

⁵³ L. Ghazarian, 'Flughafen Frankfurt-Hahn, Case C-284/12, Annotation' [2014/1] *EStAL*, 114.

⁵⁴ L. Ghazarian 2014, p. 113.

⁵⁵ T. Lübbig & T. Morgan, 'State Aid, National Courts and the Separation of Powers: Should Judges be Bound to the European Commission's Unfinished State Aid Business?' [2014/5] *Journal of European Competition Law & Practice*, 256.

⁵⁶ A. Bartosch, 'Scary Times' [2014/1] *EStAL*, 211.

⁵⁷ L. Ghazarian 2014, p. 114.

At its most extreme, it was argued that the judgment affects the preservation of certain basic principles of EU law. The role and independence of the national judiciary is seen to be under threat, insofar as the ruling attaches numerous strings to the competences of domestic courts.⁵⁸ Halting the proceedings⁵⁹ and/or paying interests into a separate account⁶⁰ are largely seen as a far more appropriate alternative to balance the rights of the actors involved. Because of the numerous checks and balances involved, these alternatives would allow national courts to act only if there is clear evidence of eminent and serious damages to competitors. In short, according to those scholars, *Lufthansa* has been considered as a not well-reasoned judgment that intrudes excessively on the task of national judges to enforce State aid law.

3.3 (...) that are unjustified. The ‘effective’ Competences of Domestic Courts in the Light of the Principles Framing EU Law

On closer inspection, these fears appear to be largely unjustified. Potential qualms regarding the correctness of the judgment as to the interpretation of EU law may ultimately vanish if one tries to understand the back-to-basics approach followed by the CJEU. The actual thorny question in *Lufthansa* concerns the role played by national courts when the Commission adopts an official – though tentative – decision that raises doubts on the compatibility of measures already paid (or under payment). As a result, the ruling referred to the scope and effects of art. 108(3) TFEU, as well as to the division of competences between the two institutions that are to give effect to the provision.

The Court of Justice has had the opportunity to explain the first question at length in previous case law. As indicated above, in the decisions in the *CELF* saga⁶¹ the CJEU has clarified that the overall objective of the interlocking competences laid down in art. 108(3) TFEU is to set up a system of prior control for any plan to grant or alter aid measures.⁶² The rationale behind this interpretation stems from a combined reading of all sentences of the provision. The first sentence imposes on Member States an obligation to inform the Commission of any plan to grant or alter aids. According to the second sentence, the Commission itself must initiate the control procedure if it considers that a measure

⁵⁸ See C. Koenig, ‘The judgment in Case C-284/12 under the Socratic Scrutiny of good justice’ [2014/1] *EStAL*, p. 2.

⁵⁹ L. Ghazarian 2014, p. 114; P. Nicolaidis, ‘Are National Courts Becoming an Extension of the Commission? C-284/12, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*’ [2014/3] *EStAL*, 413.

⁶⁰ P. Nicolaidis 2014, *ibid.*, 413.

⁶¹ See *CELF I* and *CELF II* judgments.

⁶² *Lufthansa* judgment, para. 25.

is incompatible with the internal market. The third sentence, finally, requires Member States to abstain from implementing their proposed measures until the procedure has resulted in a definitive decision on the compatibility question.

Thus in practice, State aid control serves to ensure that the Commission has enough time and elements to exclude any doubt about the compatibility issue. Each institution involved must act to pursue this common objective within its sphere of responsibilities. National judges must particularly observe the ‘preservative purpose of ensuring that an incompatible aid will never be implemented.’⁶³ In *Lufthansa*, then, the CJEU makes a coherent application of the principles already laid down in its precedents to clarify the legal framework. Equally far from ground-breaking are the competences of the two institutions involved in the enforcement of State aid referred to in the judgment. In *Lufthansa*, the Court rightly acknowledged that, since a Member State ‘shall not put its proposed measures into effect until this procedure has resulted in a final decision’, national courts must ‘pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid’ until that moment.⁶⁴ Halting the proceedings, by contrast, is not an alternative because it renders the provision of art. 108(3) TFEU fully ineffective.⁶⁵

As a result, the CJEU makes an important (though implicit) distinction with the enforcement of articles 101 and 102 TFEU, as laid down in *Masterfoods*. The roles and remedies available to the national court and to the Commission to enforce art. 108(3) TFEU are different.⁶⁶ Hence, risks of conflicting decisions require diverse answers from the institutions involved. In the terms of the Courts, the tasks of the two institutions are complementary and separate, rather than concurrent,⁶⁷ so the initiation of the formal examination cannot ‘release national courts from their duty to safeguard [...] individuals.’⁶⁸ Yet, the consequences national courts must draw (i.e., the scope of their obligation)⁶⁹ once the Commission has reached a provisional decision on the compatibility issue are still uncertain. To explain them, the CJEU in *Lufthansa* seems to make a combined reading of the two elements mentioned above and of the general ‘constitutional’ obligations of national courts.

⁶³ *Lufthansa* judgment, para. 26.

⁶⁴ *Lufthansa* judgment, para. 31.

⁶⁵ *Lufthansa* judgment, para. 32.

⁶⁶ C. Vajda QC & P. Stuart 2010, p. 632.

⁶⁷ As argued, for example, in G. Abbamonte 1997, *supra*, 90.

⁶⁸ *Lufthansa* judgment, para. 31.

⁶⁹ *Lufthansa* judgment, para. 33.

Firstly, there are the effects of the exercise of exclusive EU competences. As has been already pointed out, the role of national institutions in the area of State aid is very limited, due to the Commission's exclusive jurisdiction on the compatibility of measures with the internal market.⁷⁰ Therefore, as EU law pre-empts any further residual national competence in centralised areas, the compatibility evaluation of the Commission precludes Member States from adopting rulings that are contrary to this conclusion. In addition, the exercise of the EU's exclusive attributions entails positive obligations for national judges. The Member States are indeed under an obligation to implement EU law as part of their general duty of loyal cooperation, as laid down in art. 4(3) TFEU. Therefore, they must take all measures necessary to guarantee its application. In its judgment, the Court clearly reaffirmed the centrality of these principles, noting that 'the decision to initiate the formal examination procedure [...] does not [...] lack legal effects.'⁷¹ Then it explained those effects by saying that, after the official opening of a formal procedure, 'in the context of [the sincere] cooperation, national courts must [...] refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.'⁷²

Secondly, there is the need for effectiveness of EU law. It is well known that Member States and their relevant authorities are to ensure that EU law is implemented fully and effectively. This principle includes a positive duty to take all appropriate measures to ensure the fulfilment of the obligations, as well as a negative duty to abstain from any measure that would jeopardise the attainment of Treaty objectives.⁷³ In the case under assessment, the CJEU explains that this principle can be used to ensure the full realisation of the effects of art. 108(3) TFEU. Since the provision – examined in its entirety – has a preventive aim to guarantee the *ex ante* control system for State aid established in the Treaties, the duty of the national judges to ensure its full effects would be impaired if they did not suspend a measure that the Commission had just stated to be capable of presenting aid elements.⁷⁴ The application of the principle of effectiveness is not new. As it serves to realise the objectives of the Treaty, it fits the function of the principle as a 'powerful tool' in combination with other Treaty provisions.⁷⁵ It is interesting to note that the *Lufthansa* ruling seems to depart from the doctrine of the direct effect of the last sentence of art. 108(3)

⁷⁰ See Case C-78/76, *Steinike & Weinlig v. Federal Republic of Germany* [1977] ECLI:EU:C:1977:52, para. 10; *SFEI/ La Poste* judgment, para. 28.

⁷¹ *Lufthansa* judgment, para. 37.

⁷² *Lufthansa* judgment, para. 41.

⁷³ W. van Gerven, 'The full dimension of Article 10 EC Treaty', contribution to the XIX F.I.D.E. Congress Helsinki 2000, p. 9 (available on URL: www.fidelaw.org/q1/community.htm 2000).

⁷⁴ *Lufthansa* judgment, para. 38.

⁷⁵ M. Accetto & S. Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' [2005/3] *EPL*, 386.

TFEU. Ever since *Costa v. Enel*,⁷⁶ the primary concern of the Court of Justice confronted with the role of national judges was to safeguard the *effet utile* of the direct effect of the last sentence of art. 108(3) TFEU. This means that the standstill provision has the capacity to create legal rights, obligations and/or powers that must be recognised and enforced.⁷⁷ Consequently, it is sufficient for individual parties to demonstrate its violation in domestic litigations.

In *Lufthansa*, the CJEU makes clear that national judges must safeguard the effectiveness of art. 108(3) TFEU in all its provisions rather than only the standstill obligation.⁷⁸ However, what seems to be a shift is not a real one. First, it does not contradict the fact that individuals may claim protection of their rights when the standstill obligation is violated. Furthermore, this interpretation seems to reinforce the CJEU's reasoning if one looks at the specific case under assessment in *Lufthansa*. The reference to the last sentence of art. 108(3) TFEU clarifies that the aid may not be implemented until it has been approved by the Commission,⁷⁹ but it does not explain why national courts need to adhere to the Commission's preventive assessment of its compatibility. This is clarified by the combined reading of all the provisions forming art. 108(3) TFEU. In particular, as the last sentence of art. 108(3) TFEU serves the preventive purpose that only compatible aids are implemented, and as the Commission's preliminary decision raised doubts about this qualification and initiated the *ex ante* control of the measure, the CJEU persuasively concluded that domestic judges are bound to ensuring the full effect of the whole control system. To further explain its conclusion, the Court referred to the 'counterfactual thinking'. In the CJEU's view, whether national courts would be able to exercise their task of interpreting the notion of aid as they see fit (even in contradiction, therefore, with the Commission's provisional viewpoint), they would not allow the prior control of plans to grant new aid to reach its predicated aim.⁸⁰

The combined reading of the above-mentioned principles to give effects to art. 108(3) TFEU leads to an automatic decision for national courts to stick to the Commission's provisional viewpoint. As *juges de droit commun*, domestic courts are required to ensure the effectiveness of EU law within their sphere of power, and the one just mentioned represents the only interpretation leading to that result. The corollary is that, when the Commission has taken an official view of State aid issues, domestic institutions are under a specific duty to comply with EU obligations and must act pursuant to the view expressed by

⁷⁶ *Costa/E.N.E.L.* judgment.

⁷⁷ A. Dashwood et al, *Wyatt and Dashwood's European Union Law*, 6th ed. (Oxford 2011), 245.

⁷⁸ *Lufthansa* judgment, para. 38.

⁷⁹ See *CELF/SIDE* judgment, paras 35-36.

⁸⁰ *Lufthansa* judgment, paras 39-40.

the Commission. To this purpose, they must act to defer the implementation of planned aid until the Commission itself addresses the compatibility question.

Conceptually, the rationale of the *Lufthansa* ruling is similar to *Lucchini*,⁸¹ and the two judgments are to be read in conjunction. In *Lucchini*, the tasks of national judges confronted with a Commission's decision on State aid compatibility were also questioned. The main differences are that, in *Lucchini*, the conflict between the national judgment and EU law was actual (and not merely potential as in *Lufthansa*), and that a conflict issue existed between EU substantive rules and national procedural law too. However, these two elements are *per se* irrelevant to a departure from the well-trodden path taken by the CJEU. Both cases do indeed raise crucial questions concerning the obligations assumed by national judges to ensure the full effectiveness of EU law and, specifically, of the Commission's decisions on the compatibility question.⁸² As a result, the line of reasoning in *Lufthansa* could not have departed from the supporting precedent in *Lucchini*. This means that, as in the *Lucchini* judgment, national courts are required to do whatever is in their power to give effect to the Commission's compatibility assessment. This is so because the latter task falls within the exclusive competence of the Commission and is subject to review by the European courts.⁸³

In *Lufthansa*, then, the CJEU did not shift from its interpretative trend, but simply built on the principles that were already well grounded in its case law. Taking it one step further, the CJEU took the responsibility to provide a further clarification of the provisional mechanism in *CELFI*, by which the preservative purpose of the last sentence of art. 108 (3) TFEU is achieved.⁸⁴ In essence, the interplay between EU law and national powers is resolved by protecting the sphere of the Commission's exclusive competences and by restating the obligations of national courts. The present understanding makes it clear that the judgment did not aim to 'hush' national judges in order to avoid incoherent applications of art. 107(1) TFEU. Paradoxically, the major impact of *Lufthansa* is to make national judges' duties even clearer and more relevant than before.⁸⁵ Because they must ensure that the full effect of art. 108(3) TFEU is realized,

⁸¹ Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [2007] ECLI:EU:C:2007:434.

⁸² See on *Lucchini*, K. Lenaerts 2007, p. 1650; D.U. Galetta 2010, pp. 62-64; A. Biondi, 'Case C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA, Judgment of the Court of Justice (Grand Chamber) of 18 July 2007, 2007 [ECR] I-6199' [2008/5] *CML Rev.*, 1459-1467.

⁸³ K. Lenaerts 2007, *supra*, 1650.

⁸⁴ *CELFI/SIDE* judgment, para. 47.

⁸⁵ P. de Bandt, 'Lufthansa a new era for State aid enforcement' [2014/4] *Journal of European Competition Law & Practice*, 207.

their role is accomplished when they protect both individuals' rights and the exclusive competence of the Commission. In practice, this means that national courts have to defer the illegal payment until the Commission has taken its final decisions. Of course, their power to interpret art. 107(1) TFEU is constrained, since they cannot conclude that the measure under assessment does not constitute aid (though they can interpret the provision to determine what represents state aid in practice).⁸⁶ However, this 'side effect' does not imply any hierarchical subordination of domestic courts to the European Commission. Because the coherence of the judicial system of the European Union rests also on national judges' shoulders⁸⁷ and it is for them to apply EU law in a consistent way, adhering to the Commission's preliminary finding represents the only possibility to fulfil their obligation to protect the exclusive competence of the Commission itself.

The possibility to refer a preliminary question to the Court of Justice in order either to challenge the validity of the Commission's decision or to seek a different interpretation of the notion of aid does not contradict this reading. On the one hand, national courts cannot themselves rule on the validity of EU acts, but they have to refer this question to the CJEU.⁸⁸ On the other hand, because they are not entitled to refer a question on the compatibility issue,⁸⁹ the only possibility they have to suspend the measure if they entertain doubts about the application of art. 107(1) TFEU is to ask the CJEU to provide the correct interpretation. Against the ruling of the Court, it was argued that the judgment leaves the interests of aid recipients excessively unprotected,⁹⁰ since national judges are required to draw the consequences *ipso facto* of the Commission's provisional pronouncement. However, this corollary is not liable to affect the whole reasoning of the Court. In fact, the opposite is true. From the EU perspective, the correct functioning of the internal market is the main rationale for State aid control.⁹¹ In *Lufthansa*, the CJEU reaffirmed this objective by referring to the prior control of plans to grant new aid. Hence, when public funds are paid, the protection of the preventive aim of State aid control comes first. Nor is the above-mentioned consequence of the CJEU ruling blatantly illogical. As confirmed by the national dispute that gave rise to the *Lufthansa* judgment, the aid recipient may legitimately not be party in a proceeding in which the validity of an aid measure is contested. In fact, it is a possibility that may stem from the

⁸⁶ See below in para. 4.

⁸⁷ K. Lenaerts 2007, *supra*, p. 1659.

⁸⁸ Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*. [1987] ECLI:EU:C:1987:452, para. 15.

⁸⁹ Case C-237/04 *Enirisorse SpA v. Sotacarbo SpA* [2006] ECLI:EU:C:2006:197, para. 23.

⁹⁰ See C. Koenig 2014, p. 2; P. de Brandt 2014, *supra*, 207.

⁹¹ K. Bacon 2013, *supra*, 4.

complex structure and essence of State aid control.⁹² Therefore, taking account of the aid recipient's interests is not an obligation of the national judges in exercising their jurisdiction.

To sum up, the judgment does not come as a surprise. Rather, it is a reaffirmation of the basic principles of the EU's constitutional order – i.e., the principle of effective application of EU law and that of conferred competences – in their combined application to give effect to an act of the EU institutions. These principles function as 'gap-filling'⁹³ tools to achieve the uniformity goal in State aid enforcement. From their application, it is now clear that the role of domestic courts is not subordinate to the Commission. Rather, by safeguarding the exclusive competence of the Commission and the full effect of EU law, they must protect the individuals' rights affected by the unlawful aid.

4 Does the Application of *Lufthansa* Lead to a Coherent Enforcement of State Aid Rules by National Judges?

It is now clear from the *Lufthansa* judgment that, when the Commission has initiated a formal examination with regard to a measure that is being implemented, national courts must take the necessary measures, according to their domestic legal system, to remedy illegal payments. They cannot stay the proceeding, therefore, to ascertain how likely it is that the Commission will uphold its preliminary thoughts in its final decision. It would be misleading, however, to suppose that the CJEU ruling in *Lufthansa* would suffice to create a complete system of legal remedies⁹⁴ in case of concurrent proceedings. As pointed out above, the objective is ultimately achieved if all institutions involved are able to enforce State aid rules within their jurisdiction, so that each decision fits the system as a coherent whole.

The *Lufthansa* judgment appears to ease the tasks of domestic courts faced with enforcing the last sentence of art. 108(3) TFEU. The CJEU identified a vast range of measures to safeguard the preventive aim of State aid control. National judges may suspend the implementation of the measure, order recovery, or safeguard the interests of the parties involved and the effectiveness of the Commission's decision by way of provisional measures. In addition, if they retain some doubts about the State aid qualification or about the validity and/or inter-

⁹² See T. Jestaedt, J. Derenne & T. Ottervanger 2006, *supra*, 41.

⁹³ K. Lenaerts & J.A. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' [2010/6] *CML Rev.*, 629.

⁹⁴ K. Lenaerts 2007, *supra*, 1626.

pretation of the preliminary decision, they may seek clarification from the Commission or refer a preliminary question to the Court.⁹⁵ In fact, however, there are reasons to conclude that these instruments could fall short in providing assistance to domestic courts. A review of each of them may clarify the difficulties faced by national judges in practice.

4.1 Order to Suspend Payment, Recovery and Interim Measures: Timing and Evidence Issues in Domestic Litigations

To order the suspension or the repayment of a measure investigated by the Commission, there must be no doubt that the measure itself entails State aid within the definition of art. 107(1) TFEU. There must be also, at least, a reasonable *prima facie* conviction that the measure at stake involves State aid in order to provide interim relief in proceedings under art. 108(3) TFEU.⁹⁶ In essence, some clarity is needed on what represents State aid in practice to ensure the effectiveness of the preventive aim of State aid control.

Enforcing the *Lufthansa* ruling appears to imply merely execution activities by national judges. In practice, it could raise questions similar to the recovery proceeding of unlawful aid. In *Mediaset III*,⁹⁷ the CJEU reaffirmed that domestic judges are bound by the Commission's negative decision and are responsible for its implementation. If the Commission did not determine the actual sum of money to be repaid, it is for the national authorities – including national judges – to establish it.⁹⁸ Likewise, in cases such as *Lufthansa*, the task of the German judge seems to be limited to quantifying the actual amount of aid granted to *Ryanair* in order to be able to block the payment and/or to recoup the sums. In fact, things become more complicated when one reads the Commission's decision questioned in *Lufthansa* more carefully. The case involves a complex set of measures whose overall objective was to make *Ryanair* the airport's main airline. Some measures look especially problematic under art. 107(1) TFEU. One of the main questions concerns the economic benefit or advantage condition (i.e., several discount mechanisms on the airport tariffs). To constitute an advantage that falls within art. 107(1) TFEU, the CJEU has repeatedly held that the measure must lead to an improvement in the economic and/or financial position of the undertaking⁹⁹ that would not have been received

⁹⁵ *Lufthansa* judgment, paras 43-44.

⁹⁶ See the '2009 Notice of the Commission', paras 61-62.

⁹⁷ Case C-69/13 *Mediaset SpA v. Ministero dello Sviluppo economico* [2014] ECLI:EU:C:2014:71.

⁹⁸ *Mediaset SpA/Ministero dello Sviluppo economico* judgment, paras 19-32.

⁹⁹ Joined Cases C-399/10 P and C-401/10 P *Bouygues SA and Bouygues Télécom SA v. European Commission and Others* [2013] ECLI:EU:C:2013:175, para. 39.

in normal market conditions.¹⁰⁰ To this purpose, it has developed the market economy operator test, whose main goal is to devise whether, in similar circumstances, a ‘standard’ private investor could have been prompted to make the investment in question.¹⁰¹

Despite the above-mentioned significance in State aid assessments, the Commission’s preliminary decision in *Lufthansa* simply articulated doubts about the advantage condition. To illustrate, the Commission argued that ‘the Ryanair agreement of 2002 can constitute State aid within the meaning of article 87 (1) EC Treaty if the market investor test is not satisfied.’¹⁰² In its conclusions, the Commission also issued a request for information to verify the profitability review made by the external advisor to check the condition, meaning that its preliminary analysis was incomplete on this point.¹⁰³ In sum, the outcome of the test and, consequently, the substantive question on the advantage condition were still uncertain in the Commission’s provisional decision. What does this ‘unstable conclusion’ mean to national courts? It implies that it is up to them to dispel doubts as to the aid character of the measure. Not only must they quantify the benefit in practice, but, in order to fully enforce the CJEU ruling, they first need to examine whether the economic transaction entails an advantage.

However, establishing whether the economic effects of a measure¹⁰⁴ involve an ‘unmarketlike’ benefit is not always an easy task. From a substantive point of view, national courts have to engage in the complex economic assessment of the market economy operator test. This task could potentially raise two striking problems.

At best, there is a timing issue. Although national courts are required to provide relief to individuals until the Commission’s final decision (especially in case of lengthy formal investigations), they must also launch a difficult assessment procedure themselves. This procedure could take additional time and raise evidence questions, especially in the case of complex measures such as those under assessment. Therefore, the concrete application of the notion of aid by national judges could easily jeopardise the preservative objective of the

¹⁰⁰ *SFEI/La Poste* judgment, para. 60.

¹⁰¹ See Communication from the Commission ‘Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU’, 2014, 21; (available at URL: ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf).

¹⁰² See Commission decision on State aid C29/08, Germany – Frankfurt Hahn Airport and Ryanair, *OJ C* 12, 17.1.2009, p. 6-60 (German version), para. 287.

¹⁰³ See Commission decision on State aid C29/08 2009, para. 369.

¹⁰⁴ Case C-124/10 P *European Commission v. Électricité de France (EDF)* [2012] ECLI:EU:C:2012:318, para. 91.

last sentence of art. 108(3) TFEU. Nor would the order to block the entire contractual relationship between the airport operator and *Ryanair* be a legitimate alternative. In the 2009 Notice, the Commission suggested ordering the funds to be transferred to a blocked account.¹⁰⁵ But State aids often arise in manifold and more complex forms than the mere payment of money from one party to another. In the *Lufthansa* case under assessment, for example, some of the doubtful measures entail a discount to the normal tariffs. This means that national courts must determine the exact amount of the ‘unmarketlike’ reduction (i.e., the additional rebate that no market operator would ever offer) to decide what is State aid in practice. In other words, since the preventive aim of State aid control is that the implementation of the planned aid is to be deferred, national judges must first reach a definitive determination on the aid measure itself. Any other solution would have detrimental consequences for the whole process and for the interests of the parties (i.e., the aid provider).¹⁰⁶

At worst, there is also the issue of gathering evidence. To draw the appropriate conclusion as if the aid measure was unlawfully paid, an aid measure within the definition of art. 107(1) TFEU must exist. Yet, this conclusion would require national courts to succeed where the Commission has failed due to the lack of information. In particular, by applying art. 107(1) TFEU, they must be able to conclude that the measure entails State aid and to quantify the unlawful advantage in practice. Otherwise, their task to give full effect to the preliminary decision would not be fulfilled. The CJEU judgment was clear on this point, when it said that ‘if national courts were able to hold that a measure does not constitute aid within the meaning of art. 107 (1) TFEU and, therefore, not to suspend its implementation [...] the effectiveness of art.108(3) TFEU would be frustrated.’¹⁰⁷

Therefore, the case under assessment in *Lufthansa* is slightly different from *Mediaset III*. In the latter case, the Commission was able to deduce what the unlawful advantage was in practice, the only unsettled question being the nominal aid amount that was paid to any single recipient. In the former case, instead, the national courts were one step behind, because they were not sure whether there was any evidence to sustain the conclusion (including whether the expert opinion was reliable). The CJEU has already addressed the evidence

¹⁰⁵ See the ‘2009 Notice of the Commission’, paras 61-62.

¹⁰⁶ Case C-400/99 *Italian Republic v. Commission of the European Communities* [2005] ECLI:EU:C:2005:275, para.49.

¹⁰⁷ *Lufthansa* judgment, para. 38.

question in domestic State aid litigation.¹⁰⁸ In its view, the principle of effectiveness requires national courts to use all means available under national procedural law to give the claimant access to the evidence. However, this conclusion does not appear to be relevant to the present purpose. In *Lufthansa*, we are still not sure whether such evidence exists and whether it provides enough reasonable elements to fulfil the burden of proof.

Therefore, enforcing the *Lufthansa* ruling requires that national courts not only agree with the Commission's preliminary assessment, but also fill the evidence gap in its provisional decision. Unfortunately, this might not be always the case, especially if one considers the limited assistance offered by competitors in gathering evidence in domestic State aid litigations.¹⁰⁹

4.2 The Limited Support Offered by the Commission and by the Preliminary Reference to the CJEU

One might argue that the CJEU took this challenging consequence seriously when it provided national judges with two additional instruments. In the CJEU's view, domestic courts can either seek clarification from the Commission or make a preliminary reference to the Court of Justice. Each of these instruments pursues the common objective of ensuring the uniform application of EU law. Much of the responsibility for applying the Treaty provisions does indeed lie with the national courts, and the system could obviously lead to different interpretations of the same rule in individual cases. Therefore, the Commission supports national courts in the application of the State aid rules or in providing the relevant information. At the same time, the CJEU can give guidance on the interpretation of EU law or can rule on the validity of the acts of the EU institutions that national courts are required to apply. If one undertakes to test their functioning in practice, however, none of these instruments appears to be up to solving the unsettled questions analysed in the previous section.

Ever since the 1995 Notice,¹¹⁰ the Commission has welcomed the opportunity to help national judges in their often-complex task. Such support was reaffirmed in the 2009 Notice,¹¹¹ as well as in the latest reform of the procedural regula-

¹⁰⁸ Case C-526/04 *Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, assuming the rights and obligations of the *Agence centrale des organismes de sécurité sociale (ACOSS)* [2006] ECLI:EU:C:2006:528, paras 55-57.

¹⁰⁹ See J. Flynn Q.C., 'The Role of National Courts', in: A. Biondi, P. Eeckhout, & J. Flynn Q.C. (Ed.), *The Law of State Aid in the European Union* (Oxford 2004), 332.

¹¹⁰ See the 'Notice on cooperation between national courts and the Commission in the State Aid field' OJ C 312, 23.11.1995, 8.

¹¹¹ See the '2009 Notice of the Commission', paras 61-62.

tion.¹¹² In essence, in view of the mutual duty of loyal cooperation, the Commission recommends national judges to seek its assistance in the matter of the application of State aid rules. In addition, it may transmit the information in its possession or the written observations to address the substantive questions stemming from art. 107(1) TFEU. Despite this ‘appealing’ purpose, however, the Commission’s support activity has encountered some major drawbacks. Firstly, the extent to which there had been recourse to the Commission advisory activity has been limited up until now, and it should be noted that an informal opinion of the Commission’s services cannot provide legal certainty on the proposed approach.¹¹³ Therefore, national courts may feel reluctant to delay their intervention until they receive an act that leaves their powers intact. Secondly, another main concern is that, if the Commission and the national courts disagree on the State aid assessment, it is hardly an attractive proposition to approach the Commission as *amicus curiae*.¹¹⁴

The one possibility that might help to break the deadlock in a national proceeding would be if, during the formal procedure, the Commission concluded that State aid was present. With such an analysis in their hands, national judges would presumably find it easier to draw consequences from the preliminary decision of the Commission. Again, however, this is a hypothetical possibility that is unpredictable when the Commission takes a preliminary decision such as that questioned in *Lufthansa*. As the Commission did not fully address this question in its provisional assessment, the outcome of the investigation on the application of the notion of aid is still uncertain. So the evidence issue remains unsettled.

The reference of a preliminary ruling to the Court on the interpretation of art. 107(1) TFEU does not lead to more satisfactory outcomes either. It is well known that the Court delivers interpretative rulings on matters of EU law. A consequence of its limited scope of review is that the Court of Justice is entitled neither to assess the facts set out by the national court, nor to rule on the application of the law to the facts of an individual case.¹¹⁵ As such, the instrument provides little help in dispelling doubts about the evidence question when national judges are required to apply art. 107(1) TFEU in individual cases.

¹¹² See spec. art. 23a of the Council Regulation No 659/1999 of 22 March 1999, as amended by the Council Regulation (EU) No 734/2013 of 22 July 2013.

¹¹³ A. Sinnaeve, ‘What to Expect from National Courts in the Fight against Unlawful State Aid?’ [2005/1] *EStAL*, 2.

¹¹⁴ L. Ghazarian, 2014, *supra*, 111.

¹¹⁵ See Case C-198/01 *Consortio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato* [2003] ECLI:EU:C:2003:430, para. 62.

The remaining alternative is to make a preliminary reference to the Court in order to challenge the validity of the Commission's provisional decision. The reference does indeed appear to be the most appropriate instrument when domestic courts find themselves in conflict with the Commission's assessment of the measure's aid character. Should they deem the preliminary analysis to be flawed or incomplete, they may require the Court to curtail the legal force of the Commission's decision, so that they are free to disregard it in order to decide on the domestic proceeding. This would appear to be especially true when the challenge concerns the application of the market investor test. Whilst the Commission enjoys wide discretion to assess the factors that help to determine the economic advantage,¹¹⁶ the Court has the power of reviewing the application of the test on procedural grounds. Notably, it is entitled to impose strict conditions on the Commission, by requiring it to undertake a full assessment that takes into account all the relevant evidence available.¹¹⁷ In the preliminary decision assessed in *Lufthansa*, the Commission did not demonstrate that it undertook a complete review of the evidence available for applying the market operator test.¹¹⁸ Therefore, a preliminary reference to the Court on the grounds that the Commission analysis was incomplete could represent, in principle, the only way out for national judges.

Still, this conclusion confronts the particular facts of the case that led to the *Lufthansa* judgment. The Commission's contested decision was taken after a preliminary proceeding. To initiate the formal investigation, the CJEU requires a lower level of investigation by the Commission.¹¹⁹ Notably, by virtue of the principles of sincere cooperation, the CJEU held that it is the responsibility of the Member States to provide the EU institutions with information, so as to remove any doubts about the absence of any element of aid in the measure examined.¹²⁰ If not enough information is submitted, the Commission must undertake a sufficient examination on the basis of the evidence available to form a *prima facie* view of the measure.¹²¹ This principle, which was held in decisions on notified aid, seems valid *a fortiori* when unlawful aid measures are assessed. Otherwise, as the CJEU has convincingly argued, the Member State's failure to cooperate would have unwarranted negative consequences for the aid recip-

¹¹⁶ See, among others, Case C-290/07 P *European Commission v. Scott SA* [2010] ECLI:EU:C:2010:480, para. 64.

¹¹⁷ See A. Biondi, 'State aid is falling down, falling down: An analysis of the case law on the notion of aid' [2013/6] *CML Rev.* 1738-1741.

¹¹⁸ See above the references to the Commission decisions esp. in para. 4.1.

¹¹⁹ Case 84/82 *Federal Republic of Germany v. Commission of the European Communities* [1984] ECLI:EU:C:1984:117, paras 11-13.

¹²⁰ Case C-400/99 *Italian Republic v. Commission of the European Communities* [2005] ECLI:EU:C:2005:275, para. 48.

¹²¹ See *Federal Republic of Germany/Commission* judgment, para. 13.

ient.¹²² Therefore, the Commission's preliminary decision in *Lufthansa* does not appear unlawful. This conclusion, however, implies that the only loophole to overcome the evidence question is indeed not a real one.

As the somewhat extreme circumstances that could arise in *Lufthansa* illustrate, the coherent application of principles made in the CJEU ruling may come up against reality. Should the Commission retain doubts about the State aid qualification of particularly complex measures, it seems unlikely that national judges could have any clearer ideas to establish what amounts to State aid in individual cases. As such, this deadlock may hardly be addressed in practice. In the light of its constitutional nature, the CJEU is forced to find one-size-fits-all solutions that will not *per se* fit in all cases.¹²³ In *Lufthansa*, the consistent interpretation of the principles applied to similar cases yielded the outcome held by the CJEU. The odd consequences, therefore, do not depend on the judgment itself. Nor should the CJEU revise its case law on the scope of the Commission's assessment in the preliminary decision. The explanations illustrated above do indeed provide sound justifications for the Commission's incomplete review held by the CJEU.

On closer inspection, the mentioned 'paradox' is clearly a fact-specific consequence. An impasse in establishing what measure qualifies as State aid only arises if the case raises particularly complex evidence issues, and the obligation to suspend the measure – even provisionally – requires this question to be addressed. These circumstances are not common. In 'extreme cases' such as the one under assessment, a credible way out would be for national judges to engage in an intense dialogue with the Commission. Given its positioning and expertise, the Commission appears indeed to be best placed to consider what the correct outcome of the market operator test should be, because its compatibility assessment depends on this initial question.

As analysed above, the *Lufthansa* judgment has served to highlight that there is no hierarchical relationship between the European Commission and the domestic courts. Rather, the two institutions fulfil very diverse – although complementary – functions. On the one side, domestic courts, as Union courts, are entrusted with a typically judicial task, since they have to protect individuals' rights and to give full effect to EU law. On the other side, the European Commission is the administrative authority that enforces the rules in individual

¹²² Case T-366/00 *Scott SA v. Commission of the European Communities* [2007] ECLI:EU:T:2007:99, para. 149.

¹²³ See for the consequences of CELF I and CELF II C. Vajda QC & P. Stuart 2010, p. 636.

cases.¹²⁴ As such, the dialogue between the two parties should be understood as the interaction between the judicial and the Executive power. This relationship is typically based on the principle of loyal cooperation between the European institutions and the Member States in achieving the objectives of the Treaty, deriving from Article 4(3) TEU and giving rise to an obligation of mutual assistance. In practice, this implies that the Commission must assist national courts when national courts apply EU law,¹²⁵ and equally national courts may be obliged to assist the Commission in the fulfilment of its tasks.¹²⁶

Of course, this solution raises some major criticisms. In addition to those already indicated above,¹²⁷ other potential issues are the increasing workload of the Commission and the indirect binding effect that the Commission's opinions might assume if national judges essentially transposes them.¹²⁸ These limits, however, appear to be exceeded by the clear benefits. For the national courts, relying on the Commission's opinions is the only instrument to address the evidence issue and to provide judicial protection in complex cases, such as that assessed in *Lufthansa*. The alternative to wait until the Commission reaches the conclusive decision would lead to delayed justice (which means, in practice, denied justice). For the Commission, intervening with *amicus curiae* briefs represents the one mechanism to ensure coherence in the enforcement of State aid rules. If the Commission is still committed to succeed in its goals of increasing private enforcement in State aid field,¹²⁹ it will be all the more important to consolidate consistent application of rules from the outset. This is especially true if the possibility to provide information and opinions would be limited to the cases that really need, as exemplified in *Lufthansa*. To this purpose, it should be noted that the Commission is best placed to check where the consistent application of State aid rules is under threat.

To sum up, the intense dialogue between the national courts and the European Commission may represent a win-win scenario for both institutions to break the deadlock in 'extreme (State aid) cases'. Their mutual will and their

¹²⁴ See in the antitrust field A.P. Komninos 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' [2006/1] *Competition Law Review*, 5-26.

¹²⁵ Case C-234/89 *Stergios Delimitis v. Henninger Bräu AG*. [1991] ECLI:EU:C:1991:91, para. 53.

¹²⁶ Case C-94/00 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECLI:EU:C:2002:603, paras 30-32.

¹²⁷ See above para. 4.1.

¹²⁸ See K. Wright 'The European Commission's Own 'Preliminary Reference Procedure' in Competition Cases?' [2010/6] *ELJ*, 750-757.

¹²⁹ As lately expressed in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Eu State Aid Modernisation (SAM)*, 2012, para. 21 (available at URL: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0209>).

ability to develop an effective dialogue will be critical for the success and coherence of whole control system for State aid.

5 To Conclude

Lufthansa is undoubtedly a judgment that fits well with the case law of the CJEU and with the complex framework of the State aid rules. The German *Oberlandesgericht Koblenz* asked whether – and to what extent – a Commission’s preliminary decision to initiate a formal investigation is binding on the domestic judges that are called on to decide on proceedings concerning the recovery of payments and the order to refrain from future payments of alleged State aids. The Court held that, to ensure the effectiveness of the system of prior control laid down in art. 108(3) TFEU, national courts shall act to suspend the aid payment until the Commission’s final decision.

In order to reach this conclusion, the CJEU did not shift from its interpretative trend but simply made a correct interpretation of the main principles of EU law usually relied upon to ensure the coherence of the EU legal system. In particular, the principle of effectiveness and that of conferred competences were used as ‘gap-filling’¹³⁰ tools to achieve the uniformity goal in State aid enforcement. As such, the judgment made clear that there exists no hierarchical relationship between the national judges and the European Commission. Rather, the two institutions are to perform different roles and functions. While domestic courts, as Union courts, are entrusted with typically judicial tasks to protect individuals’ rights and to give full effect to EU law, the European Commission is the administrative authority that enforces the rules in individual cases.¹³¹

From a practical perspective, however, the application of *Lufthansa* raises some questions. As has been demonstrated in this contribution, national judges are forced to qualify what measure represents State aid in practice to draw the appropriate consequences from the CJEU ruling. The Commission, on the contrary, could legitimately be entitled to leave this question unsolved in its preliminary decision. But should the Commission have doubts on the State aid qualification, any evidence to qualify the measure as State aid may be virtually non-existent. This represents a likely consequence especially in the case of complex measures, such as those assessed in the provisional decision contested in *Lufthansa*. Furthermore, the instruments made available to national judges

¹³⁰ K. Lenaerts & J.A. Gutiérrez-Fons 2010, *supra*, 1629.

¹³¹ See in the antitrust field A.P. Komninos ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ [2006/1] *Competition Law Review*, 5-26.

in order to challenge the Commission's preliminary viewpoint do not provide enough help to address the question mentioned.

These problematic consequences suggest that entertaining a more intense dialogue with the Commission may help domestic courts to apply *Lufthansa* in practice. In particular, national judges and the Commission should be able to mutually cooperate in order to avoid an indefinite impasse in complex cases. While this approach may encounter some limits, it represents a better alternative than 'dismantling' the coherent enforcement of EU law.